Supreme Court of the United States

OCTOBER TERM, 1902.

No. 225.

JOSEPH A. SAWYER AND NELLIE A. SAWYER,
PLAINTIFFS IN ERROR,

vs.

DANIEL S. PIPER, DEFENDANT IN ERROR.

REPLY AND SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

There are a few points in the brief of defendant in error, just received by me, which may call for notice.

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This assumption ignores the facts—

(1.) That the complaint was drawn and the action tried and decided below, not only upon an entirely different theory, but upon an inconsistent cause of action.

(2.) That wholly new findings of fact and of law were required.

(3.) A judicial ascertainment of the sum then due upon the equitable mortgage was to be made by the trial court. More than mere calculation since payments made since the trial might be shown.

(4.) A judgment of foreclosure wholly different from that reversed must be rendered and entered.

(5.) Since the defendants had had no opportunity to present any defense to a demand for foreclosure of the equitable mortgage, and also in that some of the defenses originated after that trial, the asserted construction of that decision on appeal violates the constitutional guaranty of due process of law.

Decisions of this court in point here will be found below.

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WAITE, *C. J.*:

"Rule well settled and of long standing that a judgment or decree to be final must terminate the litigation between the parties on the merits of the case, so that, if *there should be* an *affirmance* here the court below would have nothing to do but to execute the judgment or decree it had already rendered."

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Partition, respective rights and interests in land in controversy. Decree entered determining such interests, and referred case to a master "to proceed to a partition according to law, etc." *Not final.*

WAITE, C. J., at page 520:

"In foreclosure suits it has been held that a decree which settles all the rights of the parties and leaves nothing to be done but to make a sale and pay over the proceeds is final. The reason is *that in such case the sale is the execution* of the *decree* and simply enforces the rights of the parties as finally adjudicated.

"Here such is not the case. What remains to be done is NOT *ministerial* but *judicial*" (103 U. S., 520).

R'y Co. *vs.* Swasey, 23 Wall., 406–409:

"An appeal may be taken from a *decree* of foreclosure and sale when the rights of the parties have all been settled and nothing remains to be done by the court but to make the sale and pay out the proceeds. The sale in such case is the execution of the decree. But to justify such a sale without consent the amount due upon the debt must be determined. Until this is done the rights of the parties are not all settled. Final process for the collection of the money cannot issue until the amount to be paid or collected by the process if not paid has been adjudged. Such adjudications require the action of the court."

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"So, too, though defendant's cross-bill claiming title was dismissed, reviewable on writ of error from final judgment."

See also Hazeltine *vs.* Central Bank, 183 U. S., 130.

Great Western Telegraph Company *vs.* Burnham, 162 U. S. [339], 346, 347:

"There is nothing in the decisions above cited, or in any other decision of this court, which countenances the position that in Wisconsin or in any other State when the highest court of the State, upon a first appeal, decides a Federal question against the appellant, and remands the case to the inferior court, not merely to carry the judgment into execution, but for further proceedings according to law, and upon further hearing the inferior court renders final judgment against him, he can have that judgment reviewed by this court by writ of error, without first appealing from it to the highest court of the State." * * *

"In the case at bar, as in McComb *vs.* Knox County Commissioners, above cited, the final judgment of the inferior court of the State may have been the necessary result of the previous decision by the Supreme Court of the questions presented for its determination; but it was none the less, on that account, a judgment of the inferior court. As such it was when rendered open to review by the supreme court upon a new appeal, and, for that reason, was not the final 'judgment of the highest court of the State in which a decision in the suit could be had.'"

Cincinnati R'y Co. *vs.* Snell, 179 U. S., 395, 397:

"We have held in too many cases, even to justify citation, that a judgment reversing a case and remanding it for a new trial or for further proceedings of a judicial character is totally wanting in the requisite finality required to support a writ of error from this court."

Upon the position taken and authorities cited on page 22, line 10 to bottom, and page 23, line 1 to 19. The position taken ignores the ground upon which the defense of election is placed, viz: That by virtue of the offer of complete relief, made before the trial began and remaining open until the final submission of the case upon briefs, the plaintiff had full and ample opportunity of complete recovery in that proceeding; the sole reason why he did not secure full relief was his refusal to allow judgment therefor to be entered. The only reason for the exception of actions wherein no recovery is possible from the doctrine of election of remedies is the fact that such action is and necessarily must be a mere vain quest.

Also in those actions the plaintiff pays the costs and disbursements of the action, while here they must be and, in fact, were taxed against plaintiffs in error.

Of the cases cited: In the article cited from 7 Enc. Pl. and Pr., at page 368, it is stated that it is held in many cases and States that the commencement of an action does not necessarily show an election of remedies. Also, at page 363, it is said:

"No suitor is allowed to invoke the aid of the court upon contradictory principles of redress upon one and the same line of facts."

Re Van Norman (41 Minn., 494) and Marshall *vs.* Gilman (52 Minn., 88) are set out and distinguished in my brief in the State court (Record, p. 91; see also National Bank *vs.* Bank of Emporia, 57 Kan., 111, and other cases there fully set forth). It is not unworthy of notice here that Thompson *vs.* Howard, 31 Mich., 311, cited there by me (Record, pp.

81 and 150) was commented upon and followed by this court in Robb *vs.* Voss, 155 U. S., 39, citing the passages as in Record, p. 81.)

In Schmidt *vs.* Hager (Minn., 1903), 93 N. W. R., 110, 111, the complaint showed on its face that the asserted cause of action was barred by the statute of limitations. But no demurrer was interposed. (A demurrer lies in such cases in that State.) The defense pleaded and sought to be proven on the trial was one of fact. The defendant, on his appeal from an adverse ruling in the trial court, for the first time raised the point that the complaint showed that the action was barred. The supreme court held such defense waived, since defendant proceeded solely upon his defense on the facts until all opportunity for amending the complaint was lost.

In the case at bar the plaintiff proceeded solely upon the cause of action held bad until all opportunity for interposing defenses had passed. In the Hager case the only loss to the plaintiff consequent upon letting in the waived defense would be a reversal and new trial. But here the loss is total and irretrievable. At page 111 of 93 N. W. R. that court said:

"The question, however, here to be decided is not whether the defendants might have availed themselves of the defense of the statute of limitations by demurrer or answer, but it is whether they waived such defense by *answering to the merits and going to trial without raising it until it was too late for plaintiff to amend.*"

I desire to add to the facts stated on page 16 of my main brief, showing the only point presented to the court at the first appeal was that the plaintiff ought not to be allowed a

judgment of foreclosure *in that action*, this passage from the opinion found at folio 110 of record:

"It is argued by defendant's counsel that *in this action* plaintiff is not entitled to a foreclosure of the equitable mortgage."

Also to add to the cases cited on page 19, Robb *vs.* Voss, 155 U. S., 13–39, and Schmidt *vs.* Hager (Minn., 1903), *supra*; also add the case of Telegraph Co. *vs.* Purdy, 162 U. S., 335, to the cases cited at line 20, page 8, of my brief opposing the motion to dismiss.

To the cases cited at bottom of page 29, main brief, add Holden *vs.* Harvey, 169 U. S., 366, wherein, at page 390, this court, by Mr. Justice Brown, said:

"Recognizing the difficulty in defining, with exactness, the phrase 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice, * * * and that no one shall be condemned in his 'person or property' without an opportunity of being heard in his own defense."

At line 9, page 34, main brief, insert Charles *vs.* City of Marion, 98 Fed. Rep., 166, wherein, at page 168, it is said:

"It is essential to due process of law that there should not only be notice of a time and place for a hearing, but, more important, that there should be a tribunal clothed with power by methods and rules prescribed by law, to hear and determine the question involved."

The fear of submitting unnecessary matter has here been somewhat allayed by the desire to lay before the court all matters of fact and decision which can be pertinent in this cause.

It is respectfully submitted that due process of law, as repeatedly defined in the decisions of this court, has been denied to these plaintiffs in error by the judgments of the State courts, and that the latter should be reversed and all proceedings subsequent to the judgment be vacated and annulled.

J. A. SAWYER,
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